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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 203

IMPERIAL MEAT COMPANY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

MATTHEW HERBERT LANDERS,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INDEX

PAGE

ARGUMENT

I. *Travis* is the Law or the Law is Unsettled... 1

II. The Offense Took Place in Missouri..... 4

III. Rule 21 of the Federal Rules of Criminal Procedure and Section 3237 of Title 18 U.S.C. 8

IV. Consideration of Some of the Precedents... 9

CONCLUSION 14

CITATIONS

Cases

Travis v. United States, 364 U. S. 631 (1961)..2, 3, 6, 7, 9, 11

United States v. Johnson, 323 U. S. 273 (1944)..... 2

United States v. Gross, 276 F. 2d 816 (2nd Cir. 1960), cert. denied, 80 S. Ct. 1602 (1960)..... 3, 4

Henslee v. United States, 262 F. 2d 750 (5th Cir. 1959), cert. denied 359 U. S. 984 (1959)..... 3, 4

Jones v. United States, 137 U. S. 202 (1890)..... 5

Fuller v. United States, 110 F. 2d 815 (9th Cir. 1940) cert. denied 311 U. S. 669 (1940)..... 7

Robinson v. California, 370 U. S. 660 (1962)..... 8

Parr v. United States, 351 U. S. 513 (1956)..... 8

United States v. James W. Milller, 246 F. 2d 486 (2nd Cir. 1957), cert. denied 355 U. S. 905 (1957)..... 9

DeRosier v. United States, 218 F. 2d 420 (5th Cir. 1955), cert. denied 349 U. S. 921 (1955)..... 10

United States v. Borow, 101 F. Supp. 211 (D. N. J. 1951) 10

Reass v. United States, 99 F. 2d 752 (4th Cir. 1938).... 10

PAGE

CONSTITUTION; STATUTES; RULES; AND TREATISES

Constitution, U. S., Art. 3, Section 2 ..... 5, 6, 8

Constitution, U. S., Amendment VI 5

18 U.S.C. sec. 287 ..... 2, 5, 7, 9

18 U.S.C. sec. 1001 ..... 6, 7, 9, 10

18 U.S.C. sec. 3237 ..... 3, 4, 8, 9, 10

18 U.S.C. sec. 3237(a) 3, 6

18 U.S.C. sec. 3237(b) 3, 11

18 U.S.C. sec. 3238 6

18 U.S.C. sec. 3239 3

62 Stat. 826 8

Act of March 3, 1911, ch. 231, sec. 42 (36 S. 1100) 9

Act of June 25, 1948, ch. 645 (62 S. 826); H. R. 3190, 80th Cong., 1st Sess. 9

Act of Aug. 6, 1958; Pub. L. 85-595. 72 S. 512; H. R. 8252, 85th Cong., 2nd Sess. 9

39 C.F.R. sec. 43.6(a) 3

Federal Rules of Criminal Procedure, Rule 21 8

4 Bl. Com. 363 6

Stephen, Hist. Crim. Law, vol. 1, pp. 9-11 6

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To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Come now the Petitioners in pursuance of the Rules of this Court and file their Reply to the Brief for the United States In Opposition. It is felt that the briefs on file cover adequately the other points discussed and treatment herein is limited to the venue point. The venue point was raised at trial following opening statement, in post-trial motions, and in the Court below.

I. Travis is the Law or the Law is Unsettled

A review of the Record and Briefs by Petitioners' Washington Counsel, who appears in this case for the first time, is the apology for this long Brief.

The Brief in Opposition gives only a veneer to the highly important venue question which should be decided by this Court. The Government seems to acknowledge that the corpus delicti of the offense under Title 18 U.S.C. Sec. 287 does not involve the use of the mails, but argues the incidental mailing of the false writing puts venue at the place of mailing. We think not. The claims were made or presented at the place received. The tender for payment took place at Kansas City.

This Court should resolve the point as it bears upon the Federal Criminal Code in all those criminal offenses where the use of the mails is not an essential jurisdictional element of the offense.

It is contended that *Travis v. United States*, 364 U. S. 631 (1961), had decided the point in a way favorable to these petitioners; if it has, then a writ should issue and direct the Court below to vacate the judgment of affirmance; if it has not, then the sound administration of Federal Criminal Law requires a resolution of a question of great constitutional and statutory significance.

In *Travis* this Court emphasized the constitutional predicate to a question of more than mere procedural import. The nature of the offense and locality of the act or acts constituting the offense were emphasized as the test in determining the *locus delicti*. Citing *United States v. Johnson*, 323 U. S. 273 (1944) the phrasing of the statute as it bore on the nature of the offense was found controlling over the fact that the mails were used.

In *Travis*, it was said "There would seem to be no offense, unless petitioner completed the filing...". Just as the affidavits had to be filed in *Travis*, the statute (Sec. 287) and the beef contracts themselves (just as the NLRB forms) required the presenting of the claims for payment at Kansas City, Missouri. The indictment in *Travis* charged a District of Columbia filing; in the present case, the indictment charged "On or about the 18th day of March, 1960, in the City and County of Denver, in the State and

District of Colorado, defendants **** did willfully and feloniously make and present, and cause to be made and presented, to the Military Subsistence Supply Agency, Department of the Army, Kansas City, Missouri, ****." The charge of making and presenting was Kansas City, Missouri.

Further, in *Travis*, this Court reiterated that venue should not "be made to depend on the chance use of the mails..." [See optional venue statute involving mails, 18 U.S.C. Sec. 3239, cf. 18 U.S.C. Sec. 3237 (b)]. The Court observed:

> "After mailing, the affidavit might have been lost; petitioner himself might have recalled it." [Citing 39 C.F.R. Sec. 43.6 (a)]

Corbin and Williston taught basic Contract law which supports this view. There was no claim within the jurisdiction of the agency until the writing was received.

Multiple venue is limited to an offense consisting of "distinct parts" or involving a "continuously moving act." Where a specific place is designated, then venue is determined in *Travis* to be at that place alone; that's this case: the Missouri district.

Title 18 U.S.C. Sec. 3237, it was held, must be read in this frame.

The dissent in *Travis* viewed 18 U.S. C. Sec. 3237 (a) as allowing Colorado venue; the dissenting opinion did not stand on sub-section (b) of Sec. 3237; nor does the Government in the present case. The view was rejected that urged "making" as beginning or occurring at the place where the writing came into existence and was mailed.

The Government in the present case draws upon *United States v. Gross*, 276 F. 2d 816 (2nd Cir. 1960), cert. denied 80 S. Ct. 1602 (1960), which went by the boards in *Travis* and further by reason of 18 U.S. C. Sec. 3237 (b) (Act of August 6, 1958). Reliance is also had on *Henslee v. United*

States, 262 F. 2d 750 (5th Cir. 1959), cert. denied 359 U.S. 984 (1959); it, too, was rejected in *Travis*, cf. dissent of Mr. Justice Harlan in *Travis* and the opinion below (ix, appendix to Petition) which is governed in *Gross* and *Henslee*.

II. The Offense Took Place in Missouri.

There is no factual dispute as to what the contracts called for, namely, delivery and payment at Kansas City. The contracts bore the identifying symbols "KC". In the United States Court of Claims in a pending civil proceeding (No. 150-61), of which this Court will take notice, covering the same transactions, the Department of Justice has unequivocally declared in a pleading denominated Amended Answer and Counterclaims:

> "Plaintiff (Imperial Meat Company) . . . : *made and presented* for payment to military officers engaged in performance of their duties as Contracting and Finance Officers *at the Kansas City* Regional Headquarters of the Military Subsistence Supply Agency, for their approval and payment, invoices demanding payment for such claimed performance, knowing that each such invoice was false, fraudulent and fictitious.
>
> "Each said invoice submitted for approval and payment had a certificate on the face thereof by the plaintiff that said order for payment was correct and just, although plaintiff knew the said invoice was false, fictitious and fraudulent.
>
> "Without knowledge of plaintiff's actions, defendant's Contracting and Finance Officers approved and paid said invoices." (Parenthetical and italics emphasis added)

Thus, unless mailing the invoices and certificates from Denver, places the offense in Denver, there is absolutely no merit to the Government's present position in this Court. Labeling the offense as continuing does not advance the discussion.

In the ordinary Dyer Act case where a vehicle is transported across state lines, Section 3237 typically fits. Driving a car from Virginia into Maryland or into West Virginia—what we will call the Harper's Ferry example—makes the point. The offense begins, continues, and ends in its substance or essence in three different jurisdictions. Venue exists in each. On the other hand, presenting or making a claim to a federal official in Kansas City becomes an effective act in the criminal sense solely and only when the invoice and certificate—constituting the claim—are lodged with or presented at Kansas City to warrant payment. Making or presenting a claim is in Kansas City. There would be even more merit to the contention that "filing" is a broader verb; but, under Section 287, the verb *file* does not appear.

Each of the seventeen substantive counts of the indictment charged that the petitioners "did . . . make and present . . . to the Military Subsistence Agency, Department of the Army, Kansas City, Missouri, an agency of the United States of America, an Imperial Meat Co. invoice, . . . said invoice constituting a claim in the amount of $ for payment of . . . meat delivered to the said Military Subsistence Supply Agency, . . . all in violation of Section 287, Title 18, United States Code."

Thus by pleadings covering the transactions, civil and criminal, the Department of Justice has recognized that the making and presenting of the claims was intended to be and was in fact done at Kansas City. Thus venue was laid and proved to be in Kansas City. In point of fact all of the beef was delivered from Denver to points without Colorado and throughout the United States.

This is not mail fraud. Nor is it a tax case; this is not a "bad beef" case; rather, a 287 case grounded in the presenting of a false writing.

Offenses against the United States must, as the Constitution prescribes, be tried within the State and within the District in which the crime was committed. (Const., U. S.,

Art. 3, Sec. 2; Const., U. S., Amend. VI; see *Jones v. United States*, 137 U. S. 202 (1890) save and except offenses on the high seas or elsewhere not in any district in which cases Congress may pass enabling legislation implementing the Constitution. See 18 U.S.C. Sec. 3238. Basically, a grand jury has no authority to inquire into offenses which are not committed in the district in which it is constituted. (4 Bl. Com. 363)

Offenses such as bigamy, perjury, rioting and most offenses against person or property are committed and consummated in a single place; the locus of the crime fixes the venue for trial. In other cases a crime is committed by several acts which are done in two or more jurisdictions, so that the entire offense is not completed in a single locality. With reference to venue, Stephen long ago said:

> "No general rule upon this matter has been nor do I see how such a rule can be, laid down, as crimes differ greatly in their nature."

> But, he adds, the cases seem to establish this test: "That a crime committed by an act which extends over more jurisdictions than one in space is committed in the jurisdiction in which it takes effect, whether or not it is also committed in the jurisdiction in which it begins to be done." (Stephen, Hist. Crim. L. Vol. 1, pp 9-11)

Accordingly, if mailing at Denver to Kansas City is significant, Kansas City is the effective point. It will be recalled that *Travis v. United States, supra*, involved an indictment under 18 U. S. C. § 1001 charging the *making* and filing of false writings, made and executed in Colorado and filed in the District of Columbia. Petitioner, as a union officer, in pursuance of a statute (repealed) providing for filing with the National Labor Relations Board of a non-Communist affidavit, mailed the writing from Colorado to the District of Columbia. Venue was attacked in Colorado but the Circuit sustained venue under 18 U.S.C. Sec. 3237(a) which provides for venue where

the offense was begun or completed. This Court, following Article 3, Section 2 of the Constitution, declared that questions of venue are more than adjective matters. "The locality of the offense" is laid down as the Constitutional base. Continuing offenses are separately treated by Congress. Thus the nature of the crime charged, i. e., the offense, becomes controlling. In *Travis* the Court said the "single act of having a false statement at a specified place is penalized."

The rationale of *Travis* controls the instant cause. In the present proceeding 18 U.S.C. Sec. 287 was involved which penalizes the making or presenting to a Federal Agency of any claim upon the United States. Until the writing making the claim was recevied by the Federal agency—Kansas City, Missouri—no claim was made or presented to the Federal Agency. "The chance use of the mails" is no more critical in a 18 U.S.C. Sec. 287 case than in a 18 U.S.C. Sec. 1001 case; in fact and in law, Sec. 287 is more specific as to locus in that it speaks of making or presenting of a claim:

1. To any person or officer in the civil, military, or naval service of the United States, or

2. To any department or agency thereof . . .

Unless the claim upon the officer, or any department or agency, is received, i. e., made or presented, there is no offense. This is not a continuing or migratory type of transaction; the Army beef contracts called for presentation at Kansas City; the corporate petitioner could not be paid in Denver, nor could it make or present a claim there; by the same token the individual petitioner Landers did nothing in Denver condemned under Sec. 287. The demand for payment occurred in Kansas City. The ex parte determination that the writings were false was made in Kansas City, not in Denver, cf. *Fuller v. United States*, 110 F. 2d 815 (9th Cir. 1940), cert. denied 311 U. S. 669 (1940).

The contracts required presentment of the claims to the Supply Agency in Kansas City. The *corpus delicti* of the offense could only involve effective making and presenting of a claim. Mailing is as remote as thinking about it would make it so. (Cf. concurring opinion of Mr. Justice Harlan in *Robinson v. California*, 370 U. S. 660 (1962)).

III. Rule 21 of the Federal Rules of Criminal Procedure and Sec. 3237 of Title 18 U.S.C.

Rule 21 of the Federal Rules of Criminal Procedure provides for a change of venue only on defendant's motion [See *Parr v. United States*, 351 U. S. 513 (1956)] and does not extend the same right to the prosecution; this for the reason that the defendant has a constitutional right to a trial in the District where the offense was committed, Const., U. S., Art. 3, Sec. 2, Par. 3; Const., U. S., Amendment VI. By making a motion for a change of venue, the defendant may be deemed to have waived this constitutional right; such a motion under Rule 21 (b) would not lie here for the reason that the indictment did not allege that the offense was committed in more than one District; as we read the indictment, it charged the offense in Missouri and yet the indictment was returned by a Colorado grand jury. The preliminary draft of the proposed amendments to Rule 21 do not purport to change existing law on the point herein involved (Committee of Judicial Conference, December, 1962).

18 U.S.C. Sec. 3237 is not controlling.[1] It provides:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> "Any offense involving the *use of the mails*, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly

provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves. June 25, 1948, C. 645, 62 Stat. 826." (Emphasis added; "use of the mails" obviously only applies where the operative statute makes use of the mails an element of the corpus delicti.)

The indictment does not allege a continuing offense, nor did the proof upon the trial show one. Thus, unless the use of the mails incidentally in any course of conduct makes the offense bi-district or multi-district, the present case could not be constitutionally prosecuted in Colorado.

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1 "This Section derives from Act of March 3, 1911, ch. 231, sec. 42 (36 S. 1100). *It was completely rewritten in 1948 to clarify legislative intent and in order to omit special venue provisions* from many sections (Act of June 25, 1948, ch. 645; 62 S. 826).

Act of June 25, 1948: H. R. 3190, 80th Cong., 1st sess: Referred to Com. on Judiciary, p. 4012 (Vol. 93, Cong. Rec.); reported back (H. Rept. 304), p. 4012; amended and passed House, p. 5048; referred to Senate Com. on Judiciary, p. 5121.

2nd sess. (Vol. 94 Cong. Rec.)
Reported with amendment (S. Rept. 1620) p. 8075; amended and passed Senate, p. 8721. Senate insists on amendments and asks conference, p. 8722; House concurs in Senate amendments, p. 8864; examined and signed, p. 9354, 9363; approved by President, p. 9367 (Public No. 772).

The only amendment made to sec. 3237 since 1948 was made in 1958 (Act of Aug. 6, 1958; Pub. L. 85-595, 72 S. 512), which added present subsection (b).

Act of Aug. 6, 1958: H. R. 8252, 85th Cong., 2nd sess.
1st sess: referred to House Com. on Judiciary (Vol. 103, C. R., p. 9746).

2nd sess. (Vol. 104, C. R.)
Reported with amendment (H. Rept. 1890) p. 11533; amended and passed House, p. 13064; referred to Senate Com. on Judiciary, p. 13115; *reported (S. Rept. 1952)*, p. 14855; passed Senate, p. 15243; approved by President, p. 16747 (Pub. L. 595)."

IV. Consideration of Some of the Precedents

Does a violation of Sec. 287 *involve the beginning of the offense* within the meaning of Sec. 3237 where the writings

evidencing the claim were mailed from Colorado to Missouri?

In a pre-*Travis* case, *U. S. v. James W. Miller*, 246 F. 2d 486 (2nd Cir. 1957), cert. denied 355 U. S. 905 (1957), a Section 1001 prosecution was involved. The letters containing the false statements were mailed from New York City and received in the District of Columbia and Illinois, respectively. Venue was not timely raised in New York; therefore, waived, and the Court's opinion on venue was dictum. The Court took the position that Sec. 3237, dealing with offenses commenced in one district and completed in another, controlled, citing *DeRosier v. United States*, 218 F. 2d 420 (5th Cir. 1955), cert. denied 349 U. S. 921 (1955).

United States v. Borow, 101 F. Supp. 211 (D. N. J. 1951), a Sec. 1001 (formerly 80) prosecution took place in New Jersey for the substantive offense of making a false writing in a matter within the jurisdiction of a Federal Agency. The letter was prepared for mailing from New Jersey to New York but in fact was hand delivered in New York. The Court observed that a presentation of the false statement was required: "Obviously, the mere filling out of a false application, without more, would not be a matter within the jurisdiction of the War Assets Administration or constitute a crime in violation of § 80".

It was held that the crime consisted of one act, i. e., the delivery of the letter to the government official in New York City, and "no crime was committed merely in the preparation of the letter in New Jersey absent its delivery."

The Court, emphasizing *Reass v. United States*, 99 F. 2d 752 (4th Cir. 1938), urged that Sec. 42 of the Judicial Code (precursor of 18 U.S.C. Sec. 3237) was inapplicable. It was suggested that Sec. 3237 is particularly applicable to the jurisdiction (venue) over crimes "which consist of two or more distinct elements or acts that may be committed in different districts, such as the crime of conspiracy. It stated that the offense in question belonged to that class of crimes which lacks continuity of performance and consists of a

single act which occurs at one time and at one place in which only it may be tried, although preparations for its commission took place elsewhere."

There was no mailing in *Reass*, nor in *Borow*, and the question was left open. *Travis* has been since decided by this Court and the "mailing" factor put at bay where the thrust of the statute involves doing an end-result act and an ingredient of the offense does not involve use of the mails or transportation. (Sec. 3237 (b))

CONCLUSION

Petitioners pray the grant of the writ of certiorari to review and reverse the Judgment of the Court of Appeals for the Tenth Circuit.

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